ARLEN SPECTER
PENNSYLVANIA

United States Senate
WASHINGTON, DC 20510–3802
specter.senate.gov

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June 15, 2010

The Honorable Elena Kagan
Solicitor General of the United States
Washington, D.C.

Dear Solicitor General Kagan:

By letter dated May 25, 2010, I identified three subjects that I intend to cover at your confirmation hearing. I write to identify four additional subjects that I intend to cover.

The Supreme Court's Workload

The Supreme Court's workload has steadily declined. In 1870, the Court decided 280 of the 636 cases on its docket; in 1880, 365 of the 1,202 cases on its docket; and in 1886, 451 of the 1,396 cases on its docket. In 1926, the year Congress gave the Court nearly complete control of its docket by passing the Judiciary Act of 1925, the Court issued 223 signed opinions. The Court's output has declined significantly ever since. In the first year of the Rehnquist Court, the Court issued 146 opinions; in its last year, it issued only 74.

Chief Justice Rehnquist's successor, John Roberts, testified during his confirmation hearing that the Court could and should take additional cases. But the Court has not done so. During the 2005 Term, it heard argument in 87 cases and issued 69 signed opinions; during the 2006 Term, it heard argument in 78 cases and issued 68 signed opinions; during the 2007 Term, it heard argument in 75 cases and issued 67 signed opinions; and during 2008 Term, the Court heard argument in 78 cases and issued 75 signed opinions. The figures for the pending 2009 term will likely be in accord.

The Court continues to leave important issues unresolved. They include, as noted in my May 25 letter, the constitutionality of the Bush administration Terrorist Surveillance Program (TSP) and the contours of the Foreign Sovereign Immunity Act's domestic tort exception as applied to acts of terrorism.

Equally significant are unresolved circuit splits. Two prominent academic commentators note that the Roberts Court "is unable to address even half" of the circuit splits "identified by litigants." Tracey E. George & Christopher Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 Duke L.J. 1439, 1449 (2009). Questions on which the circuits have split include: May jurors consult the Bible during their deliberations in a criminal case and, if so, under what circumstances? Must a civil lawsuit predicated on a "state secret" be

dismissed? When may a federal agency withhold information in response to a FOIA request or subpoena on the ground that it would disclose the agency's "internal deliberations"? Do federal district courts have jurisdiction over petitions to expunge criminal records?

I intend to ask you, among other questions:

(1) Whether you agree with the Chief Justice Roberts's statement at his confirmation hearing that the "Court could contribute more to clarity and uniformity of the law by taking more cases;"

(2) Whether the Court has the capacity to hear substantially more cases than it has in recent years;

(3) Whether you favor reducing the number of Justices required to grant petitions for *certiorari* in cases involving circuit splits or otherwise; and

(4) Whether, if you are confirmed, you will join the Court's *cert.* pool or follow the practice of Justice Stevens (and the Justice for whom you clerked, Justice Thurgood Marshall) in reviewing petitions for *certiorari* yourself with the assistance of your law clerks?

Deference to Congressional Factfinding in Reviewing the Constitutionality of Federal Legislation

The constitutionality of federal legislation often turns on how much deference the Supreme Court gives to justificatory factual findings made by Congress. Recent nominees to the Court have emphasized that such findings are entitled to substantial deference. Chief Justice Roberts was especially emphatic on the point. He even testified that when a judge finds himself "in a position of re-evaluating legislative findings," he or she "may be beginning to transgress into an area of making law . . . ."

In too many cases during the last decade, however, the Court has disregarded Congressional findings of fact to an unprecedented degree. The most recent example was *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), where in striking down the federal ban on independent campaign expenditures by corporations, the Court disregarded what Justice Stevens called in dissent a "virtual mountain of evidence" assembled by Congress establishing the corrupting influence of such contributions on the political process. And the Court did so, again in Justice Stevens' words, "without a shred of evidence" as to how the challenged provision "have been affecting any entity" other than the petitioner in the case.

The Court's disregard of Congressional fact-finding has been especially pronounced in cases striking down laws enacted to remediate civil rights violations (whether under the commerce clause or the Fourteenth Amendment to the Constitution). These included two cases about which I have questioned prior nominees to the Court: (1) *United States v. Morrison*, 529 U.S. 598 (2000), which struck the provision of the Violence Against Women Act providing a

federal civil remedy for victims of sex-based violence, despite Congress's well-documented findings of relevant constitutional violations nationwide; and (2) *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), which struck the provision of the Americans With Disabilities Act prohibiting disability-based discrimination in employment by states, despite Congress's compilation (in the dissenter's words) of "a vast legislative record," based on task force hearings attended by more than 30,000 people, "documenting 'massive, society-wide discrimination' against persons with disabilities." As I noted in pre-confirmation-hearing letters to Chief Justice Roberts and Justice Sotomayor, the Court in *Morrison* even went out of its way to disparage Congress's fact-finding competency. Justice Souter noted in a dissent joined by three other Justices that the Court had departed from its longstanding practice of assessing no more than the "rationality of the congressional [factual] conclusion[s]."

Chief Justice Roberts's statements during oral argument in *Northwest Austin Municipal District v. Holder*, 129 S. Ct. 2504 (2009), may portend even worse things to come. The case concerned the constitutionality of a key section of the Voting Rights Act that Congress extended (by a Senate vote of 98 to 0) for another 25 years during my chairmanship of the Judiciary Committee. Ultimately the Court avoided the constitutional question in *Northwest Austin* by deciding the case on narrow statutory grounds. But during oral argument, Chief Justice Roberts called into question the validity of Congress's legislative findings as to the need for the reauthorization. He said that, in extending the Act, "Congress was "sweeping far more broadly than they need to."

I intend to ask you, among other questions, whether you think that the Court has been sufficiently deferential to Congressional fact-finding and whether you would go about analyzing the sufficiency of the record underlying the reauthorization of the Voting Rights Act.

Television Coverage of the Supreme Court

Although the public has the undisputed right to observe the Court's proceedings, few Americans have any meaningful opportunity to do so. Even those who are able to visit the Court are not likely to see an argument in full. There are not nearly enough seats. Most will be given just three minutes to watch before they are shuffled out to make room for others. In high-profile cases, most visitors will be denied even a three-minute seating. As Justice Stevens observed during an interview, "literally thousands of people have stood in line for hours in order to attend an oral argument, only to be denied admission because the courtroom was filled." Those who wish to follow the Court's proceedings must content themselves with reading the voluminous transcripts or listening to audiotapes released at the end of the Court's term. (The Court regularly denies, without explanation, requests to release the audiotapes of oral argument on a same-day basis.) It should come as no surprise that, according to a recent poll taken by C-SPAN, nearly two-thirds of Americans favor television coverage of the Supreme Court's proceedings.

In April 2010, the Senate Committee favorably reported both my resolution (S. Res. 339) expressing the sense of the Senate that the Court should permit television coverage and my legislation (S. 446) requiring it to allow coverage. In the last two Congresses, the Committee

favorably reported nearly identical legislation (S. 1768 in the 109th Congress and S. 344 in the 110th Congress) that I introduced.

Statements made by the current Justices indicate that a majority of them—Chief Justice Roberts, Justices Stevens, Ginsburg, Breyer, Alito, and Sotomayor—are favorably disposed toward allowing coverage or at least have an open mind on the matter. Justice Stevens, whom you would replace, has said that allowing cameras in the Supreme Court is "worth a try."

Your past statements suggest that you are proponent of coverage. Soon after becoming Solicitor General, you told the Ninth Circuit Judicial Conference that "if cameras were in the courtroom, the American public would see an extraordinary event. . . . When C-SPAN first came on, they put cameras in legislative chambers. And it was clear that nobody was there. I think if you put cameras in the courtroom, people would say, 'wow.' They would see their government working at a really high level – at a really high level. That is one argument for doing so."

I intend to ask you whether, if confirmed, you will support television coverage and, if you will, whether you will try to persuade your reluctant colleagues to do likewise.

Constitutionality of Regulation of Campaign Finance

In *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), the Supreme Court held unconstitutional provisions of federal law prohibiting corporations and unions from making certain independent campaign expenditures in support of candidates for federal office, thereby putting corporations on the same footing as individuals (including citizens). Some organizations opposed to campaign-finance reform have heralded *Citizens United* as the beginning of the end of campaign finance regulation. The next step, according to the policy briefs of these organizations, is to challenge the prohibition on corporate campaign contributions and, in doing, attempt to eliminate the remaining case-law distinctions between the speech rights of individual natural persons and of corporations. Under existing federal law, corporations may not make campaign contributions. (They may do so only through tightly regulated PACs.) The Supreme Court has upheld this restriction against First Amendment challenge.

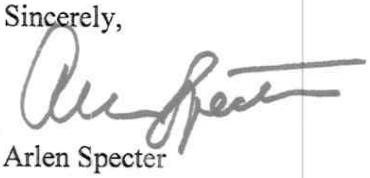
Some organizations have even advocated an end to limits on campaign contributions—as distinct from campaign-related expenditures—by individuals. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court upheld limits on contributions by individuals, even as it struck down a provision of federal law prohibiting independent expenditures in support of candidates for office. The Court accepted Congress's finding that allowing "large individual financial contributions" threatens to corrupt the political process and undermine public confidence in it. *Buckley's* holding on this point has been well-settled law for nearly 35 years.

I intend to ask you, among other questions:

(1) Whether, under First Amendment law, there remains anything left of the distinction between contributions from a corporation and those from natural persons.

(2) What considerations would you bring to bear in deciding whether to overrule the portion of *Buckley v. Valeo*, 424 U.S. 1 (1976), upholding limits on campaign contributions by individuals?

Sincerely,



Arlen Specter

cc: Chairman Patrick J. Leahy, Senate Judiciary Committee
Ranking Member Jeff Sessions, Senate Judiciary Committee
All Members of the Senate Judiciary Committee